

The Presumption of Innocence and the Misuse of Drugs Act

Rajiv Shah

I. Introduction

Section 14 of the Misuse of Drugs Act, 1990 (Cap 133)[[1](#)] puts the burden on an accused to prove that he did not have drugs for the purposes of trafficking. It is a legal burden and not a mere evidential burden. The accused has to discharge this burden on the balance of probabilities as per the finding in *R v Francois*[[2](#)]. Hence, section 14 engages Article 19 of the Constitution through the restriction it imposes on the presumption of innocence, even if it can be justified according to Article 19(10)(b). In *Imbuni v Republic*[[3](#)] the Constitutional Court held that what has now become section 14(1)(e) was constitutional and did not infringe Article 19. This article will argue that *Imbuni* was incorrect and that the whole of section 14 is unconstitutional.

The structure of this article will follow that of the proportionality analysis:[\[4\]](#)

1. Does the restriction pursue a pressing social need/legitimate aim?
2. Is it rationally connected to that aim?
3. Does it restrict the right no more than is necessary to achieve that aim?

Part II will argue that the pressing social need pursued is not the fighting of drugs but rather the curing of an extraordinary proof imbalance. Part III will argue that in some cases the measure may not be rationally connected to that aim. The 'necessity' enquiry will be split in two parts. Part IV will argue that there are other less restrictive means of curing the proof imbalance. Part V will argue that even if there were no less restrictive alternative means section 14 increases the risk of wrongful convictions and that, given the seriousness of the offence and the sentences it carries, the impact on the accused is substantial. Hence, section 14 is not a proportionate restriction on the presumption of innocence and so is unconstitutional as it cannot be necessary in a democratic society.

As will be seen below all other courts from common law jurisdictions that considered equivalent provisions found them to be unconstitutional. Furthermore, it will be argued that the mistake made by the Constitutional Court in *Imbuni* was that it failed to appreciate the difference between "peculiar knowledge of the accused" and "ease of proof by the accused".

II. Pressing Social Need

What pressing social need does section 14 pursue? One tempting answer might be that it is the goal of fighting the scourge of drugs. Not so. As Sachs J said in the Constitutional Court of South Africa in *State v Coetzee*:

"Much was made during argument of the importance of combating corporate fraud and other forms of white collar crime. I doubt that the prevalence and

seriousness of corporate fraud could itself serve as a factor which could justify reversing the onus of proof. **There is a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become.** The starting point of any balancing inquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences, massively outweighs the public interest in ensuring that a particular criminal is brought to book (see *Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City Council* 1992 (3) SA 562 (N) at 567). Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. **Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise.** If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption ... the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases."^[5]

That statement was cited approvingly by Lord Steyn in *Lambert*^[6], by Lord Nicholls in *Johnstone*^[7] and by Elias CJ in *Hansen*.^[8]

In other words, securing more convictions cannot be a legitimate aim as there is no public interest in convicting innocents. Instead, could it be that the legitimate aim is securing more convictions of guilty people? Such a proposal seems sensible. However, as David Harmer points out the default position is that there is an imbalance of proof between the accused and the prosecution; the latter must prove the guilt of the former beyond reasonable doubt. So the mere fact that it might be *hard* to prove the guilt of the accused is not a sufficient reason to reverse the burden of proof. Rather, it can only be, and this has to be shown, that there is an *extraordinary* imbalance of proof to justify reversing the burden of proof and restricting the presumption of innocence. ^[9]

Hence, the only legitimate aim that a restriction of the presumption of innocence can pursue is that of curing an extraordinary imbalance of proof.

III. Rational connection

In *Leary v United States* the US Supreme Court held that a criminal statutory presumption "must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend".^[10] In *R v Oakes*^[11] the Supreme Court of Canada applied a similar test and concluded that the Canadian presumption of trafficking

was incompatible with the presumption of innocence. A key feature of the Canadian presumption is that it was triggered by any amount, however small.

It was on that basis that the Seychelles Constitutional Court in *Imbunidi* distinguished *R v Oakes* stating that:

"[T]he reverse onus provision [in *R v Oakes*] failed the second criterion, as the basic fact of possession and the presumed fact of possession for trafficking had no rational connection as it was too vague. This decision as regards the second criterion may not be valid in Seychelles as the Misuse of Drugs Act specifies the quantity above which the presumption operates. Hence, there is in our law a rational connection between the basic fact of possession and the presumed fact that he was possessing over 28 grammes for the purpose of trafficking."^[12]

With respect, the Court was wrong to conclude that the specification of a minimum threshold means there is a rational connection. It could be that the threshold specified is so close to the average consumption that it cannot be said that a presumption of trafficking follows from possession of such an amount.

Hence, the Court of Appeal of Hong Kong held in *R v Sin Yau-Ming*^[13] that the equivalent Hong Kong presumption was incompatible with the presumption of innocence. The presumption was triggered by possession of 0.5 grams of heroin. The evidence before the court was that the average daily consumption was between 0.25 and 1 gram.

Similarly in *State v Bhulwana* the Constitutional Court of South Africa considered that the presumption of trafficking triggered by possession of 115 grammes of "dagga"^[14] was unconstitutional because it was "not unreasonable for a regular user to possess that quantity".^[15]

Hence the South African Constitutional Court held that the threshold was too low and so not rationally connected. Perhaps it could be that the State could show that the thresholds specified in the Seychelles legislation are high enough. However, there are two other difficulties with section 14: (i) the irrelevance of purity, and (ii) other factors indicating intent to traffic.

Purity

In *Simeon v R*^[16], the Seychelles Court of Appeal held that for the purposes of section 14 it was the amount in pure form that counted. In 2014, the Misuse of Drugs Act was amended to reverse that decision such that the purity no longer matters. This has the effect of undermining the rational connection of the presumptions. Whilst it might very well be the case that 2 grammes of pure heroin is significantly more than the average daily use of a typical user this will not be so with 2 grammes of a substance with 10% purity. Hence, if the threshold was based on the pure amount it could be said that intention to traffic was more likely than not to follow from the possession of such an amount but this cannot be said in the latter case with 10% purity.

Other factors

In any event, the quantity of the drugs found is not the only factor to determine whether there is an intention to traffic. In the UK, the government had considered introducing **evidential** presumptions to traffic that would be triggered by possession of certain quantities. These were enacted with section 2 of the Drugs Act, 2005. However, those provisions were never brought into force and were repealed by the Policing and Crime Act, 2009. In the course of the consultation about the Drugs Act, the Crown Prosecution Service pointed out that a flat amount of drugs might not be sufficient to indicate whether someone intended to deal: "(They noted that) amounts may vary depending on whether the person is a heavy user, the financial resources of the user, or where/when the person intends to deal."^[17]

Experts and deference

Even if, notwithstanding the above, it is possible to find a rational connection between possession of a certain quantity of drugs and the intention to traffic, whether section 14 meets that test will have to be decided by a court based on evidence of the typical consumption of drugs in Seychelles. Whilst other countries that have established similar reverse burdens did so on the basis of a report of independent experts (e.g. New Zealand), in Seychelles the figures appear to have been plucked out of thin air.

In *R v Hansen*, Blanchard J dissented from the majority holding of the Supreme Court of New Zealand that the reverse burden was incompatible with the presumption of innocence. He did so on the ground of deference to the experts that had come up with the amount of 28 grammes to trigger the presumption. There can be no such deference in Seychelles.

IV. Other ways to cure the imbalance of proof

Is there even an extraordinary imbalance of proof?

What is the extraordinary imbalance of proof that section 14 seeks to cure? In *Imbuni* the Constitutional Court said:

"There is, in modern times a realism of the problems facing the prosecution in drug cases. Hence, specially [sic] in cases where the conduct of an accused calls for an explanation, a reverse burden does not affect the hallowed presumption of innocence. There arises relevant facts which are peculiarly within the knowledge of the accused. Proof of such facts, even in the general law of evidence falls on the accused."

In other words, there is an imbalance of proof because the relevant facts lie within the peculiar knowledge of the accused.

Let us take a few examples to illustrate the point. Suppose you forget your laptop in a public place. I am then seen to take it away. My conduct undoubtedly calls for explanation. Whether I am guilty of theft will depend on my mental state: If I intended to permanently deprive the owner then I am guilty of the offence of theft but if what I wanted was to bring it to the police so that it could be reunited with its true owner then I am not guilty of theft. Indeed I am a good citizen. My mental state is of course a matter within my peculiar knowledge.

Suppose I kill you. My conduct calls for explanation. Suppose that explanation is self-defence. There were no witnesses. Again, the relevant facts are all within my peculiar knowledge.

If the reasoning of the Constitutional Court were correct it would be legitimate for the legislature to reverse the burden of proof in the case of theft. This is because the conduct calls for explanation and the relevant facts are within my peculiar knowledge. Similarly, it would make it legitimate for the legislature to reverse the burden of proving self-defence. Those two conclusions do not seem right. If the Constitutional Court suggests that conduct calling for explanation combined with peculiar knowledge is a sufficient justification for reversing the burden of proof its conclusion is clearly over-inclusive.

Perhaps, what the Constitutional Court meant, instead, is that the facts lay within the peculiar knowledge of the accused and there is no other way of proving his mental state. After all, in both the theft and the self-defence examples, there are external factors with which one can prove the mental state of the accused. However, that is also the case with trafficking. In the UK, the offence is one of possession with intent to supply and the prosecution has the burden of proving that ulterior intent. It manages just fine by relying on external factors such as the quantity, the purity, the type of packaging, the presence of a lot of texts on an accused's phone, etc.^[18] For those reasons, whilst there may be an imbalance of proof, it is doubtful whether there is an extraordinary imbalance of proof.

Are there less restrictive means of curing the imbalance?

The fallacy of the argument based on peculiar knowledge lies in the fact that it confuses peculiar knowledge with ease of proof. Ian Dennis explains the relationship between the two concepts as follows:

"Ease of proof is by no means the same concept as peculiar knowledge. Consider the following examples. A defendant who has a licence to drive or to sell intoxicating liquor can easily produce it if required. It is easier for him to do this than for the prosecution to prove the negative proposition that he did not have a licence. In such a case the prosecution would have to adduce evidence such as registers of licence-holders, or perhaps evidence that the defendant failed to produce a licence on demand. The former may entail trouble and expense, the latter may result in conflicts of testimony or disputes whether non-possession is a reasonable inference from non-production. It should be noted though that the defendant does not have peculiar knowledge of his possession of a licence; that

knowledge is available to the prosecution from evidence such as registers, but it is just more burdensome and costly to locate it. On the other hand, the defendant does have peculiar knowledge of his state of mind at the time of a criminal act; he has privileged access to his intention, knowledge or belief. But does it follow from his peculiar knowledge that it is easier for him to prove absence of a criminal intention than for the prosecution to prove its presence? That seems to be contestable, particularly if the defendant is likely to cut a poor figure as a witness, so that his testimony is unlikely to be believed. Moreover, in some cases the existence of intention may be an overwhelming inference from the circumstantial evidence of what the defendant did at the time."[\[19\]](#)

Lord Bingham, in *AG's Ref 4/02*, accepted this point. In that case, the burden was put on the accused to show that the organisations which they were members of were not proscribed (as being terrorist organisations) at the time they joined and that they had no further dealings with them. The Court of Appeal held that the reverse legal burden was justifiable as the facts lay within the peculiar knowledge of the accused. A majority of the House of Lords reversed that decision with Lord Bingham saying that despite the accused's peculiar knowledge, given the nature of such organisations, "it might be all but impossible for him to show that he had not taken part in the activities of the organisation at any time while it was proscribed".[\[20\]](#)

That is not to say that peculiar knowledge is irrelevant. It can justify the imposition of an evidential burden. As Dennis puts it:

"The significance of the defendant's peculiar knowledge of certain facts is not therefore that it supports the imposition of a legal burden on the defendant to prove those facts. Peculiar knowledge can at best support the imposition of an evidential burden to raise the issue of those facts, in circumstances where the prosecution would not otherwise know in what form a defence based on those facts might arise. It is for this reason that the defence bears the burden of raising the issue of common law defences such as self-defence or duress. It would not be reasonable to expect the prosecution to negate such justifications and excuses without being made aware of the facts relied on to support them, and in most of these cases it is only the defendant who knows those facts."

In *R v Hansen*[\[21\]](#), the majority of the New Zealand Supreme Court held that the reverse burden of trafficking triggered at possession of more than 28 grammes of cannabis was incompatible with the presumption of innocence as there were less restrictive means, namely an evidential burden, to achieve the required goal. To reach that conclusion it applied Dennis's analysis to hold that the fact that the accused had peculiar knowledge of his intention to traffic was not a reason for imposing a reverse legal burden of proof:

"[\[226\]](#) A key factor in balancing the conflicting societal and individual interests is to assess whether requiring an accused to prove the absence of the necessary mental element is reasonable, given that only the accused, as the person in possession of the drugs, will have first-hand knowledge of what this purpose was.

[227] In some instances, the proof of facts by an accused, concerning which he has first-hand knowledge, will be relatively straightforward. Often there will also be valid administrative reasons for putting the burden of proof of such facts on an accused. One instance arising in traffic offences is whether an accused held a driver's licence at the relevant time. It is obviously far easier for the accused to prove he held a driver's licence than for the authorities to prove he did not.

[228] It is not, however, always the case that having primary knowledge of facts relevant to an element of a crime makes proof of that element by the accused an easier task. **First, for an accused to prove his state of mind is a more difficult exercise than proving a simple fact such as that he held a licence at a particular time.** That is especially the case when an issue before the court concerns the moral culpability of the accused. (See Dennis 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' (2005) Crim LR 901 at 919.) **Secondly, a person charged with possession of controlled drugs for supply, whose defence is that the drugs were held exclusively for personal use, has to acknowledge guilt of the offence of possession.** That acknowledgement of itself is likely to demean the accused in the eyes of the jury and for that reason the uncorroborated evidence of a person who admits to being a drug user as to his or her intent will often carry little weight, even assuming the accused presents well as a witness. **Thirdly, those who might support the accused's version in court will often be unwilling to give evidence for the defence.** In cases where the quantity of drugs was large, the accused will also face a strong case and **the combined effect of these disadvantages may make it very difficult, if not impossible, to discharge the burden placed on him despite his primary knowledge of what he intended."**

The same reasoning ought to apply to Seychelles. It follows that the legal reverse burden of proof cannot be justified by reason of the peculiar knowledge of the accused.

V. Impact of wrongful conviction on the accused

Even if it could be so justified the presumption in section 14 might still be unconstitutional if it has a disproportionate impact on the presumption of innocence. The main purpose of the presumption of innocence is to prevent wrongful convictions. Two issues must therefore be considered: (i) does the presumption in s. 14 increase the risk of a wrongful conviction and (ii) what is the impact of that on the accused?

In *Lambert* Lord Steyn put the matter quite starkly regarding the effect of a reverse burden:

"If the jury is in doubt on this issue, they must convict him. This may occur when an accused adduces sufficient evidence to raise a doubt about his guilt but the jury is not convinced on a balance of probabilities that his account is true. Indeed it obliges the court to convict if the version of the accused is as likely to be true as not. This is a far-reaching consequence: a guilty verdict may be

returned in respect of an offence punishable by life imprisonment even though the jury may consider that it is reasonably possible that the accused had been duped. It would be unprincipled to brush aside such possibilities as unlikely to happen in practice."[\[22\]](#)

It is, therefore, clear that section 14 increases the risk of wrongful conviction. What is the impact of that on the accused? In considering the propriety of the reverse burden of proof the courts have considered whether the offence was a regulatory or a properly criminal one,[\[23\]](#) what were the penalties imposed for the offence,[\[24\]](#) and whether the reverse burden related to the gravamen of the offence[\[25\]](#) or to another matter (such as whether one had a licence). The justification is that in cases of a truly criminal matter carrying a high prison sentence the injustice of a wrongful conviction would be particularly great. A conviction under section 5 of the Misuse of Drugs Act carries a minimum sentence of 16 years and a maximum sentence of 60 years. For more than 250 grammes of cannabis there is a mandatory life sentence. These are clearly very serious penalties. A wrongful conviction for such an offence would be a very grave miscarriage of justice. Hence, it is doubtful whether a restriction of the presumption of innocence could be justifiable in this case.

VI. Conclusion

Therefore, it can be seen that on a proper analysis of section 14 of the Misuse of Drugs Act it is unconstitutional. It is doubtful whether there is an extraordinary imbalance of proof that must be cured. Furthermore, because of the irrelevance of the purity level, it cannot be said that possession of a certain quantity makes it more likely than not that the accused intended to traffic. In addition, concerns about the accused's peculiar knowledge do not justify the imposition of a legal burden; an evidential burden would be sufficient. In any event, given the strong penalties for the offence it is doubtful that the increased risk of wrongful conviction can be justified.

This conclusion accords with considerations appreciated by other common law courts considering whether a presumption of trafficking was compatible with the presumption of innocence. In all those cases cited,[\[26\]](#) the courts held that the reverse burden was not compatible with the presumption of innocence.

VII. Postscript: Misuse of Drugs Act, 2016

This article was written before June 2016 when the Misuse of Drugs Act, 2016 repealed and replaced the Misuse of Drugs Act, 1990. Section 19 of the 2016 Act is substantially similar to section 14 of the 1990 Act. There are, however, two differences that ought to be mentioned.

Firstly, the levels prescribed in section 19 only refer to pure drugs unlike with section 14 as amended. Above, I had said that the fact purity did not matter further undermined the rational connection section 14 had with the goal to be achieved. This makes it more likely that section 19 would satisfy the

rationality test. For that the State would have to show that the amounts specified would be significantly above the typical levels of use. Even if the State could show that it would still have to show that less restrictive means of curing the imbalance of proof (if indeed there is such an imbalance); on this point my analysis of section 19 is the same as with section 14: an evidential burden would suffice to cure the imbalance.

The second difference is the impact of a wrongful conviction on the accused. The 2016 Act removed the minimum mandatory sentences and instead replaced them with indicative minimum sentences in the case of aggravated offences only. As such a conviction for trafficking would no longer lead to a minimum sentence of 16 years. Nevertheless, the offence is not one of a regulatory nature and still remains a serious one for which a custodial sentence would normally be imposed. Hence, the conclusion remains unchanged: the impact on the accused is such that it is doubtful whether the presumption of innocence could be restricted.

Therefore, section 19 of the 2016 Act is also unconstitutional.

[1] See the postscript below where section 19 of the Misuse of Drugs Act, 2016 is considered.

[2] [2000] SLR 103.

[3] (unreported) SCC 8/2001, 7 May 2002.

[4] *Seychelles National Party v Government of Seychelles* [2015] SCCC 2 at [50]; *Sullivan v Attorney General* [2014] SCCA 29.

[5] *State v Coetzee* [1997] 2 L.R.C. 593 at [220] (Sachs J) (emphasis added).

[6] *R v Lambert* [2002] 2 A.C. 545 at [34].

[7] *R v Johnstone* [2003] 3 WLR 1736 at [49].

[8] *R v Hansen* [2008] 1 LRC 26 at [43].

[9] D Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66 Cambridge Law Journal 142, 158–9.

[10] (1969) 395 US 6, 36 (Harlan J).

[11] [1986] 1 SCR 103.

[12] At the time section 14 was triggered by possession of 28 grammes of cannabis.

[13] [1991] HKCA 86.

[14] i.e. cannabis.

[15] [1995] ZACC 11 at [23].

[16] (unreported) SCA 23/2009; notes in *Leading Cases* 348.

[17] Summary of responses to the Home Office consultation letter on section 2 of the Drugs Act 2005, p. 7 (available at http://www.criminalsolicitor.net/forum/uploads/Gavin/files/2006-10-15_112443_acmd-cons-summary.pdf - accessed 02/01/2017).

[18] See the Crown Prosecution Service's Guidelines For Prosecutors: http://www.cps.gov.uk/legal/d_to_g/drug_offences/#a17 (accessed 02/01/2017).

[19] I Dennis, 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' [2005] *Criminal Law Review* 901, 914.

[20] *AG's Ref 4/02* [2005] 1 AC 265 at [51].

[21] [2008] 1 LRC 26.

[22] *R v Lambert* at [38].

[23] *Ibid* 910–11.

[24] *Hamer* 149–151; *Dennis* 913–15.

[25] *Hamer* 151–56.

[26] *R v Oakes* (Canada); *R v Sin Yau-Ming* (Hong-Kong); *State v Bhulwana* (South Africa); *R v Hansen* (New Zealand).